Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 77-194

BASIL W. VESPE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

BASIL W. VESPE,

vs. *Petitioner,*

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Basil W. Vespe petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals denying a petition for rehearing is attached (App. A, *infra*, pp. 1a). The judgment order of the Court of Appeals affirming the judgment of the

District Court is attached (App. B, *infra*, pp. 3a). The order of conviction at the District Court is attached (App. C, *infra*, pp. 5a). There have been no written opinions.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, pp. 4a) was entered on June 14, 1977. A timely petition for rehearing and suggestion for rehearing in banc was denied on July 11, 1977 (App. A, *infra*, pp. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether petitioner was entitled to a charge to the jury on the issue of entrapment and his specific theory of defense which included abandonment plus his being entraped by co-defendant Stein as a government agent.

(2) Whether the trial court, although it issued the standard entrapment charge to the jury, committed reversible error in not charging, as requested, on petitioner's theories of defense which included abandonment and entrapment by co-defendant Stein as a government agent.

(3) Whether petitioner submitted a timely request for his theory of the case to be charged to the jury and whether an objection was made to the charge in the manner permitted by Rule 30 of the Federal Rules of Criminal Procedure.

STATUTES AND RULE INVOLVED

1. Title 18 of the United States Code §371 provides in pertinent part:

> "Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

2. Title 18 of the United States Code §201(b) and (2) provides in pertinent part:

> "Bribery of public officials and witnesses.
>
> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of

value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent —

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States;

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States."

3. Federal Rule of Criminal Procedure 30 provides:

"At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to

their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

STATEMENT

Petitioner, referred to as Vespe, was indicted and convicted by a jury on three of the four counts of an indictment dealing with conspiracy to impair, obstruct and defraud an Internal Revenue Service Agent while in the performance of an audit. Vespe was charged with violation of Title 18 of the United States Code, §371. He was further charged with giving Five Thousand Dollars ($5,000) to an IRS Agent with the intent of influencing his audit in violation of Title 18 of the United States Code, §201(b) and 2.

Vespe appealed to the Court of Appeals claiming that the charge to the jury was defective and that it did not present his theory of the case. Specifically, although an entrapment charge was issued, the defense of abandonment by the defendants of the original criminal design, with subsequent inducement by the government, although requested, was not presented to the jury. Vespe also requested a charge as to being entraped by a co-

defendant who was in the position of a government agent. This request was also refused.

Vespe's appeal to the Court of Appeals was denied in the form of a judgment order which cited *United States vs. Watson,* 489 F.2d 504 (3 Cir. 1973). A petition for suggestion for rehearing in banc was also denied.

The prosecution of this case was undertaken pursuant to United States Constitution Article III, §2 which provides for federal jurisdiction over matters arising under the constitution and the laws of the United States.

During the period of May 16th through June 21st, 1974, an IRS Agent, Hartley Tucker, audited Vespe's corporate and personal tax returns. Co-defendant Stanley Stein acted as an accountant, representing Vespe, in negotiations with Tucker. During every meeting and phone call, subsequent to May 16, Tucker was equipped with a recording device. Tucker, through phone calls and personal meetings, embarked on a course of conduct designed to aggressively pursue Stein and insure his presence at all auditing procedures. There was a disputed factual issue as to whether, on May 16th, Stein placed packets of money before Tucker. Tucker said the money was placed before him and Stein denied making any such offer.

After calling Stein three times on the telephone to insure his presence at a May 21st meeting, Tucker told Stein to appear for another conference on May 24th. At this meeting the agent discussed a potential one year tax liability of Two Hundred Forty Thousand Dollars, ($240,000) and the possibility of an

arrangement between the parties whereby, according to Tucker's testimony, an alleged bribe would be given to Tucker with the amount dependent on the size of the tax deficiency.

Stein testified that Tucker threatened to bring in specialists to audit this account with a potential tax liability of Seven Hundred Thousand Dollars ($700,000). Tucker was being pressed by his superiors to complete the audit. During the May 24th meeting Tucker brought up the subject of a potential bribe in response to which, according to the transcript of this taped conversation, Stein replied "no, in other words do your audit. Go through with it. Don't put your neck on a limb, I just don't want to blow this kid out." Stein testified he was not interested in any bribe as of this meeting and told the agent to process the audit on a normal basis. He further said that as of the date of a subsequent meeting, June 5th, he succumbed to Tucker's request for money in order to avoid a maximum tax deficiency for Vespe.

Lastly, Stein testified that as of June 7th he was stalling, or "delaying, deferring anything, just to hold him off." He "really didn't want to go through with it." Ultimately, employees of Vespe gave Five Thousand Dollars ($5,000) in cash to Agent Tucker.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has based its decision on *United States vs. Watson, supra.* The entrapment test defined here was evidence that the government initiated the crime regardless of the pressure applied to the defendant and any evidence negating the defendant's propensity to commit the crime. Clearly, the government, through the use of recording devices and an aggressive pursuit of the defendant made possible the commission of this bribe. Additionally, defendant's indecision and attempt to abandon the crime were indicated by Stein's remarks to Tucker on May 24th about not going through with the bribe but just completing the audit. The Third Circuit has held on page 507 of the *United States v. Watson* opinion that on the issue of the defendant's right to a charge of entrapment, all conflicts are resolved in favor of the defendant "no matter how improbable we may find the defense version of the facts."

The above decision has also held that where a defendant does not admit the crime charged, he is not entitled to any entrapment instruction and should not complain that the entrapment charge was erroneous. Although it is admitted that Vespe did not testify or admit any crime, this should not bar an entrapment defense. *United States v. Watson, supra,* is based on the Ninth Circuit case of *United States v. Hendricks,* 456 F.2d 167 (1972). However, the current position of the Ninth Circuit is better expressed in a latter case, *United States v. Demma,* 523 F.2d 981 (1975) wherein the Ninth Circuit in interpreting all the Supreme Court decisions on entrapment, held that a defendant may assert entrapment without being required to concede that he committed the crime charged or any of its elements. Reliance

was placed on *Sorrells v. United States,* 287 U.S. 435 (1932) wherein Chief Justice Hughes held a defense of entrapment is not an admission of guilt. The government cannot imply guilt where it institutes the crime as to have induced the activity does not induce the state of mind, because the activity may reflect any of several different motives. The Ninth Circuit specifically held in the 1975 *Demma* decision that the 1973, Third Circuit *Watson* rationale, on this issue, conflicts with Supreme Court authority.

The Third Circuit has clearly recognized the defense of abandonment as an entrapment defense in *United States v. Klosterman,* 248 F.2d 191 (1957). Here the defendants were also indicted for bribing an IRS Agent, through the use of a recording device, under the same statutes as in the case at bar. The court held that a defendant had abandoned the criminal scheme but was then lured back into it by the government's entraping solicitation. The court further held that one defendant became the agent of an IRS official for the purpose of entraping another defendant.

In the case under consideration, even if the original design was created in the mind of defendant, if a jury could interpret Stein's disclaimer to Tucker on May 24th as an abandonment, with subsequent inducement to commit the crime as a result of Tucker's activity, this was a valid defense to be presented to the jury. Here the "entraping solicitation" was Tucker's continued pressing for Stein's presence at all meetings and initiating the majority of their conferences.

Additionally, in the case at bar as in *United States v. Klosterman, supra,* one co-defendant went to another for money

to pay a government agent. At this point the soliciting co-defendant becomes an agent of the government as against the paying defendant. This requested charge was also denied.

It is also clear that where there is any evidence supporting a defense, even if it is weak and the only support is the defendant's own testimony, he is entitled to a charge which precisely and specifically presents his theory of the case as otherwise the Judge is acting as a fact finder and is in effect directing a verdict on the issue against the defendant. *Bird v. United States,* 180 U.S. 356 (1901); *Tatum v. United States,* 190 F.2d 612 (D.C. Cir. 1951); *Perez v. United States,* 297 F.2d 12 (5 Cir. 1961); *Strauss v. United States,* 376 F.2d 416 (5 Cir. 1967).

Petitioner further alleges strict compliance with Rule 30 of the Federal Rules of Criminal Procedure in that during the course of the testimony the rational of *United States v. Klosterman, supra,* was specifically mentioned or named to the trial judge. Further, defendants submitted a timely charge and objection after the charge was issued to the jury.

Petitioner argues that the position of the Third Circuit, as represented in *United States v. Watson, supra,* where a defendant does not admit the crime charged, is not entitled to any entrapment instruction and cannot complain that the entrapment charge was erroneous, is in conflict with the position of the Ninth Circuit as enumerated and the law of this Court in *Sorrells v. United States, supra.* A defense of entrapment is not tantamount to an admission of guilt. Furthermore, the action of the Third Circuit in this case is in conflict with *United States v. Klosterman, supra.*

It is respectfully submitted that in order to promote the efficient administration of criminal justice the circuits should be instructed as to a uniform policy regarding when a defendant is entitled to an entrapment charge. Petitioner's position is that any defendant is entitled to an entrapment charge regardless of an admission of guilt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Fredric R. Cohen

RICHMAN, BERRY, FERREN & TYLER
Attorneys for Petitioner

APPENDIX

APPENDIX A — ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2658

UNITED STATES OF AMERICA

v.

STANLEY M. STEIN and BASIL W. VESPE,

Basil W. Vespe,

Appellant

Present:

SEITZ, *Chief Judge*, STALEY, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

Appendix A

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Joseph F. Weis, Jr.
Judge

Dated: July 11, 1977

APPENDIX B — JUDGMENT ORDER

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2658

UNITED STATES OF AMERICA

v.

STANLEY M. STEIN and BASIL W. VESPE,

BASIL W. VESPE,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Crim. No. 75-287)

Submitted Under Third Circuit Rule 12(6)
June 9, 1977

Before: WEIS, STALEY and GARTH, *Circuit Judges.*

After considering all issues raised by appellant:

(1) Whether defendant-appellant was entitled to a charge to the jury on the issue of entrapment and his specific theory of defense

which included abandonment plus his being entrapped by co-defendant Stein as a government agent?

(2) Whether the trial court, although it issued the standard entrapment charge to the jury, committed reversible error in not charging, as requested, on defendant's theories of defense which included abandonment and entrapment by co-defendant Stein as a government agent?

(3) Whether defendant submitted a timely request for his theory of the case to be charged to the jury and whether an objection was made to the charge in the manner permitted by Rule 30 of the Federal Rules of Criminal Procedure?

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.[1]

BY THE COURT,

JOSEPH F. WEIS, JR.
Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: June 14, 1977

1. *See* United States v. Watson, 489 F.2d 504 (3d Cir. 1973).

APPENDIX C — ORDER OF CONVICTION

UNITED STATES DISTRICT COURT

FOR DISTRICT OF NEW JERSEY

Docket No. Cr. 75-287

BASIL W. VESPE,

Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, November 23, 1976 with counsel Charles H. Nugent, Esq.

Plea:

Not Guilty

Finding & Judgment:

Not Guilty. Defendant is discharged as to Count 2

Guilty as to Counts 1, 3 and 4

Defendant has been convicted as charged of the offense(s) of Conspiracy, Bribery of U.S. Official and Aiding and Abetting.

Appendix C

Sentence or Probation Order:

On Count 1, the court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) years.

It is Further ORDERED that the Execution of Term Sentence be suspended and Defendant placed on Probation for a period of Three (3) years. Said period of probation to commence upon defendant's release from term sentence imposed this day on Count 3:

On Count 3 — One Year (1);

On Count 4 — that the defendant do pay a fine of Five Thousand dollars ($5,000.00); Defendant to stand committed until the fine is payed;

It is Further ORDERED that the Order for the payment be stayed until December 31, 1976; and,

It is further ORDERED that the defendant surrender himself to Allenwood on December 7, 1976.

FILED
Nov. 24, 1976
Angelo W. Locascio
Clerk

s/ Stanley S. Brotman
U.S. District Judge

Date: 11-23-76